

## REMARKS

Applicants wish to begin by thanking Examiner Cook for the courtesy she extended to their attorney, Max Bachrach, during a telephone discussion held on October 14, 2003, and her follow-up call of October 15, 2003. Claims 1, 6 and 16 are amended further to the Examiner's comments. Claims 1-19 are pending in this application. No new matter has been added.

In the Office Action, the claims are provisionally rejected under 35 U.S.C. § 101 as allegedly claiming the same invention of claims 1-5 and 7-11 of co-pending application no. 09/853,617 ("the '617 application"). Applicants respectfully traverse this rejection.

A rejection under § 101 is only appropriate if the claims of an application and a patent are identical in scope. Manual of Patent Examining Procedure § 804 (August 2001). Thus,

[a] reliable test for double patenting under 35 U.S.C.101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent. *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970). Is there an embodiment of the invention that falls within the scope of one claim, but not the other? If there is such an embodiment, then identical subject matter is not defined by both claims and statutory double patenting would not exist.

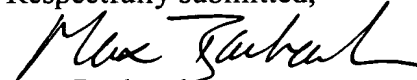
*Id.*, § 804(II)(A).

As discussed during the telephone conference of October 14, the claims pending in this case and in the '617 application do not satisfy the double patenting test. For this reason, Applicants respectfully request that the rejection under § 101 be withdrawn.

No fee is believed to be due for this response. However, if any fees are required to enter this response into the file of the application and/or to avoid abandonment of the application, please charge such fees to Pennie & Edmonds LLP's Deposit Account No. 16-1150.

Date: October 21, 2003

Respectfully submitted,



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